SUPREME COURT, U. S.

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, ...

No. 74-1360

DONALD M. PETERSON,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF TEXAS, consisting of two corporations named GROUP MEDICAL & SURGICAL SERVICE and GROUP HOSPITAL SERVICE, INC.,

Respondents.

* * *

DONALD M. PETERSON,

Plaintiff-Appellant,

v.

BILL WEST et al.

Defendants-Appellees.

An Appeal from the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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To the Honorable Judges of the Supreme Court:

OPINIONS BELOW

One of the lower court opinions, that of the U.S. Court of Appeals for the Fifth Circuit, was reported at 508 F. 2d 55. A copy of that opinion and the two orders of the Federal

district court (one for each case) are reproduced in a separate Statement of Jurisdiction as Exhibit B and Exhibits A-1 and A-2, and herein as Exhibit A.

JURISDICTIONAL BACKGROUND

The statutory jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1254(1).

Appellant seeks a review of an opinion of the Fifth Circuit Court of Appeals, issued and entered on February 14, 1975. The appellant's petition for rehearing was timely filed, and was denied by the appellate court on March 26, 1975, see Exhibit D in the separate filing entitled Statement of Jurisdiction. Appellant's notice of appeal was filed by the court of appeals on or about April 7, 1975, and a copy thereof is included as Exhibit E in the appellant's Statement of Jurisdiction.

The Federal court system has jurisdiction here to decide the meaning and scope of the Federal statute 28 USC Sec. 1442, which is the predicate here for jurisdiction. The Supreme Court has jurisdiction to correct the Federal court of appeals when:

1—the appellate court exercises the legislative power of government,

2—the appellate court itself makes unsupported findings of fact, which deprives appellant of due process, and

3—the appellate court fails to follow the law of the land, as set forth in U.S. Supreme Court decisions.

The basis for jurisdiction in this case is more fully dis-

cussed in a separate filing made by appellant in this appeal, entitled *Statement of Jurisdiction,* and therefore is not repeated here.

QUESTIONS PRESENTED

The questions presented in this appeal may be summarized as follows:

1—Was it error for lower court to amend a Federal statute, deleting therefrom provisions material in the instant case?

2—Absent allegations and evidence in the record, are defendants entitled to benefits of removal statute (28 USC 1442)? As defendants failed to prove entitlement to removal statute, does the Federal court system have jurisdiction of this case?

3—Where a Federal appellate court on its own initiative, unsupported by either allegations or evidence, makes the necessary findings of fact and conclusions to dismiss the cases, was appellant denied due process?

4—May a Federal court of appeals ignore the law of the land, and hold inconsistent therewith, regarding immunity *(Scheuer v. Rhodes, supra,)* and right to a hearing *(Wood v. Strickland, supra,)*?

5—Where a a Federal court of appeals issues three opinions on the identical facts, must the court be consistent in its holdings and in applying the law? Where inconsistencies are unexplained by court of appeals, is appellant not entitled to rely on prior decision or to an explanation?

APPLICABLE STATUTES AND REGULATIONS

Involved in this case are two provisions of Federal law, (1) due process of law under Amendment V of the Constitution and (2) a Federal statute (28 USC 1442) authorizing removal of certain litigation to the Federal court system.

The applicable part of Amendment V reads as follows: "No person . . . shall . . . be deprived of life, liberty or property, without due process of law."

The applicable part of the Federal statute reads as follows:

U.S.C. Tit. 28, §1442.

1442. Federal officers sued or prosecuted.—(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under the Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in

the discharge of his official duty under an order of such House. * * *

The court of appeals, in footnote one of its opinion, Exhibit A, erred by quoting only part of the statute, as follows: (Appendix page A-5)

footnote 1: 28 U.S.C.A. § 1442 provides:

> (a) A civil action or crimina lprosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office.

STATEMENT OF CASE

This case, consisting of two civil cases, started in May, 1973, when Plaintiff-appellant (Dr. Donald M. Peterson) filed these petitions in the court system of the State of Texas, in Dallas, Texas. All parties of both Texas cases are residents of Dallas, Texas. The first petition named as defendants, Bill West, an insurance company executive, and six other individuals for tort damages resulting from wrongful interference with Dr. Peterson's medical practice. The second petition is against two different Dallas insurance companies, to collect unpaid medical fees with interest and recover tort damages for participating in a conspiracy. One insurance company is a Medicare Intermediary, the other is not. Six of the individuals are government employees, four being field investigators or supervisor thereof, and two are attorneys with the

duty to advise the field investigators as to their duties and rights of participating physicians.

Defendants filed removal petitions in the Federal district court in Dallas, and these cases were transferred to the Federal court system. The authority for the transfer was the removal statute: 28 USC § 1442(a).

The transfer was made though defendants failed to allege the facts which must be proven as a basis for jurisdiction and removal, as enumerated in the statute. There should have been allegations to the effect that: (1) each defendant was an agent or agency of the U.S. (2) each defendant was acting under color of authority and (3) each defendant was acting either to apprehend or punish criminals or to collect revenues of the government. Section 1442(a) requires this proof as a condition precedent.

Likewise there was a defect in proof. No hearings were held to prove jurisdiction, nor were any affidavits submitted. There was no clear predicate for removal and jurisdiction. The appellate court attempted to cure this defect by making finding of fact, see reported decision, Enclosure A.

The Federal district court dismissed these two cases on the grounds of res judicata. Such decision was in error, as indicated by the government's brief submitted to the appellate court, which argued that some sort of public policy supported the dismissal. But the appellate court seemed intent on aiding these defendants, so the appellate decision was based on other grounds, not on res judicata. The appellate court dismissed on the grounds of personal defenses grounded on govern-

mental immunity. But the defendants had not alleged or proven up these defenses.

The appellate court was not to be denied, it was intent on helping these defendants. So, the appellate court proceeded to make the necessary findings of fact in a companion case before the court *(Peterson v. Weinberger)* and then applied those facts to the instant case. But many of their findings in the *Weinberger* are in error. For example, the court of appeals found that the defendant, Group Hospital Service, Inc., is a medicare intermediary. It is not a Medicare intermediary. It is not an agent or agency of the U.S. government. Their findings include other errors, contrary to the evidence in the *Weinberger* case, but that is beyond the scope of this analysis. For appellant contends he is entitled to a hearing in the instant case, at least as to the defendants here who were not defendants in the companion case.

The court of appeals held on appeal as follows:

(1) defendants were entitled to Sec. 1442(a) benefits,

(2) the suits were properly removed, and the Federal court system was the proper forum, and

(3) the personal defenses of immunity for each defendant requires a dismissal of the suits.

The appellant contends the appellate court made many errors. Also the Federal district court committed other errors in this case not considered herein.

SUMMARY OF ARGUMENT

For convenience, the issues are grouped in this summary into three parts, in the next three paragraphs.

The transfer of this litigation to a Federal court forum upon motion of these defendants under a removal statute (28 USC 1442(a)) was an error. These defendants are not eligible. There was a material and erroneous misquote of the statute by the lower courts, which was the equivalent of amending the statute. Defendants failed to allege the three essential elements which must be proven by each. There was no evidence presented by any defendant to prove his entitlement to benefits of the removal statute. It was error for the appellate court itself to cure defects in defendants' personal defenses by making findings in this case and in a companion case.

The appellate court erred in dismissing these cases, involving tort and contract, on the grounds of personal defenses predicated upon governmental immunity. The fact situation of each defendant is different, and each must prove his immunity. This proof did not exist. The dismissal was arbitrary, contrary to the law of the land in *Scheuer v. Rhodes* (1975) .....U.S. .....To deny appellant his right to a hearing is to deny him due process of law, which is guaranteed by Amendment V of the Constitution.

The inconsistent policy of the Fifth Circuit court of appeals should be corrected. In the instant case *(Group Medical & Sugrical Service)* the findings and corclusions are dependent upon and rely on the *Weinberger* facts and conclusions. But

with identical facts, in *Weinberger* the court of appeals was inconsistent with and refused to rely on facts and conclusions in its opinion in *U.S. v. Peterson*. The appellate court made no effort in its opinion to explain its inconsistent policies and holdings. This is not justice.

ISSUE I THE REMOVAL STATUTE: IS USC §1442(a)

There has been a failure by each defendants to establish his entitlement to benefits under the removal statute, 18 USC § 1442(a). Thus, it was error to transfer these two Texas cases to the Federal court system, for Federal jurisdiction had not been established.

The applicable statute was enacted in one way by Congress, but as quoted in part by the lower court it appears to be entirely different in its provisions. This was error on the part of the lower court.

As a condition precedent to entitlement under Section 1442(a), a defendant must establish three elements:

1. an agent or agency relation with U.S. government,
2. acts done under color of authority, and
3. he was a certain class of person (4 classes)

In the case of persons of the first class, as here, defendant must prove he was *either* in apprehension or punishment of criminals *or* in collection of revenues

In the instant case there are nine different defendants. Each defendant must allege and prove his entitlement.

No defendant here made proper allegations.

No defendant here presented any proof as to these three elements of jurisdiction, either by affidavit or by hearings. One defendant here, for instance, simply cannot establish any contractual relation to the U.S. government. The defendant, Group Hospital Services, Inc., is a Texas insurance company which owed fees due to Dr. Peterson for services rendered his patients and because of an insurance contract between the company and the State of Texas, not the U.S. government.

Under these circumstances the Federal courts lack jurisdiction. It was error, therefore, to transfer these cases to the Federal court system. Consequently, these cases should be remanded to the Texas courts.

The scope of the statute here is clear enough. To construe the statute, the court must refer first to the provisions of the statute itself. The wording of the statute here is clear enough. The misquote here of the statute is also quite obvious. The deletions from the statute, as made by the appellate court, was the same as that in the government's brief. These deletions effectively amend the statute. So amended, the statute would be broad enough to include some of these defendants So amended, the statute is so broad that most defendants petitioning for its benefits would be eligible. As quoted, the meaning is such that the four classes subsequently enumerated in the statute, as enacted by Congress, become contradictory and thus ridiculous. Obviously Congress did not intend for the statute to be construed and applied as here done by the lower courts.

The appellate court would justify such a construction as

made by it on the grounds its application must be "broad" and not a "narrow, grudging interpretation." The appellate court's interpretation is indeed broad. It is in reality much broader than was intended by Congress. The statute should be construed and applied according to its terms. That is justice and good law. The courts in applying the statute should be concerned first with what Congress enacted, as is clear from the statute itself. There is no ambiguity in the statute, the only ambiguity here is in the misconstruction made of the statute, which resulted from the incomplete quotation of the statute in the government's brief.

Incidentally, the statutory provision here being construed is Section 1442(a) of Title 18. This litigation does not involve any other provision upon which defendants may claim the use of a Federal forum.

In view of the utter simplicity of this issue, no citations of cases seemed necessary. No other Federal court has before attempted to legislate away these provisions in Section 1442.

This reported decision is bad law. It is an erroneous precedent, and should be corrected. Congress did not intend for this statute to be so broad. This decision is a bad precedent for future litigants. As well such a bad construction of a statute, if uncorrected, because it is so grossly wrong, would contribute to a loss of confidence in the Federal judicial system.

ISSUE II GOVERNMENTAL IMMUNITY, A PERSONAL DEFENSE

The appellate court predicated its dismissal of these actions on the grounds of governmental immunity, a contention presented by the government in its brief for defendants. Incidentally, the Federal government is not a party in this action. Further, the appellate court in the instant case relied upon its findings of fact and conclusions which were part of its opinion in a companion case, the *Weinberger* case. For a copy of the *Weinberger* case, see Enclosure C of this petition. As the wrong law was applied in the *Weinberger* case, appellant has appealed that decision to the U.S. Supreme Court. It was error for the appellate court to rely on *Weinberger* as dispositive here, for in the instant case there are other causes of action and other defendants. The appellant is entitled to a hearing in the instant case.

The appellate court has here dismissed appellant's cases on the grounds of governmental immunity, as explained in the *Weinberger* case. But the appellate court's application of the law in the *Weinberger* case is in error. The immunity rule for governmental executives from *Barr v. Matteo* (1959) 360 U.S. 564 is simply not controlling here, for here the defendants are field investigators and their co-conspirators. The appellate court has ignored the law of the land, as cited by appellant's counsel, and has refused to reconcile its decision with 7 recent decisions[1] made by the Supreme Court in the last five years.

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[1] *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 38, 29 L.Ed. 2d 619, 91 S.Ct. 1999.
Doe v. McMillan (1973) 412 U.S. 306 L.Ed. 2d 912.
Logue v. U.S. (1973) 412 U.S.521, 37 L.Ed. 2d 121.

The cases cited to the court of appeals appear in footnote 1 below. These cases hold that appellant has rights, that the government is liable for its wrongful acts, that governmental immunity is a personal defense to be proven by each defendant, that to deny a hearing to appellant on this defense claimed by each defendant is to deny him due process.

The appellate court's decision cannot be reconciled with these decisions. As the holding in the instant case is contrary to these decisions which are the law of the land, the holding here must be reversed. This issue is more fully considered in the petition filed with the Supreme Court in the *Weinberger* case.

The defense of a defendant, claiming immunity as he was acting as an agent of the Federal government, is a personal defense. As such, it must be properly alleged and there must be a hearing as to the facts. These personal defenses, raised here in briefs on appeal, were issues not properly raised by defendants. It was error for the appellate court to decide this case on these grounds, for in so doing the appellant was denied his rights to deny allegations and to examine witnesses.

ISSUE III THE INCONSISTENT HOLDINGS

The appellant here complains about the inconsistent action of the court of appeals of the fifth circuit in the three

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Footnote 1 (Continued)

Scheuer v. Rhodes (1974) 416 U.S. 232, 40 L.Ed. 2d 90.
Goldberg v. Kelly (1970) 397 U.S. 254, 25 L.Ed. 2d 287.
Goss v. Lopez (1975) ..... U.S. ....., 42 L.Ed. 2d 725.
Wood v. Strickland (1975) ..... U.S. ....., 43 L.Ed. 2d 214.

cases that have been before that court involving appellant. This inconsistency is also mentioned in appellant's petition filed with U.S. Supreme Court in the companion *Weinberger* case, now on appeal. The three cases involve the identical fact situation, with minor exceptions as to the instant case. Here in this case allegations include two other causes of action, one of which occurred after the petition was filed in *Weinberger,* and herein some defendants were not named as defendants in *Weinberger.* And of course in the first case decided by the court of appeals (the *Peterson* case) the only defendants were the appellant and his brother, James E. Peterson. But for our purposes here the fact situations may be considered as identical.

The material facts are summarized briefly. Some 120 Medicare claims were prepared and submitted by James E. Peterson, using an Irving, Texas post office box of his, using appellant's name and physician code number and containing appellant's forged signature. Appellant first learned of the filing of claims (the wrongful act under False Claims Act) some 8 weeks later when the checks for the physical therapy services rendered were received in his office. Appellant in good faith paid the money to the ostensible owner, who had rendered the physical therapy services.

In the first case, the *Peterson* case, Enclosure B of this petition, the court of appeals carefully reviewed the facts, and concluded that appellant was not a conspirator to making false statements. The evidence showed *appellant knew not,* and a jury verdict to the contrary was set aside.

Then in the second case, the *Weinberger* case (Enclosure C), the court concluded to the contrary. The court on the same facts reached an inconsistent result: that *appellant knew* of the filing of false claims. Here the appellate court imputed intent to appellant, based on his handling of funds 8 weeks after the filing of the claims. Thus, in this second case the appellate court was in no way governed by its holding in the prior decision involving the identical facts.

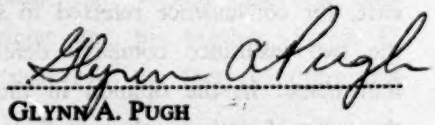
The third case before the court of appeals is the instant case, for convenience referred to as the *Blue Cross* case, as the two insurance company defendants do business under that name. In the opinion in the instant case, Exhibit A, the court of appeals relies on findings of fact from the *Weinberger* case, for there is no evidence or allegations in the instant case.

Thus, we find the court of appeals in the *Blue Cross* case adopting the findings and conclusions of fact from the companion *Weinberger* case, and the holding here is predicated on the borrowed findings. Thus, the court relies on its findings in a companion case having an identical fact situation. But then, why did the court not follow this policy in the *Weinberger* case? The findings and conclusions of fact in *Weinberger* are inconsistent with those of the court in the *Peterson* case, court's prior decision involving the identical fact situation. A comparison of the findings of fact in the two appellate decisions in *Peterson* and *Weinberger* illustrates not only inconsistency, but absurdity as well. This inconsistency is contrary to justice and to law.

CONCLUSION

It is respectfully prayed that the Court review the judgment of the U.S. Court of Appeals for the Fifth Circuit, and summarily without scheduling any oral hearing, enter a judgment reversing the decision below, ordering a remand of these cases to the Texas court system, or in the alternative ordering the lower Federal court to hold hearings after proper allegations are made by each defendant.

Respectfully submitted,



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SCHEDULE OF EXHIBITS

Exhibit A — Peterson v. Group Medical & Surgical Service (CA 5, 1975) 508 F.2d 33, copy of appellate court's reported opinion in instant case. A-2

Exhibit B — U.S. v. Peterson (CA5, 1974) 488 F.2d 645, prior decision of court of appeals on identical facts, absolving appellant, as Exhibit C A-8

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EXHIBIT A

Donald M. Peterson, Plaintiff-Appellant,
v.
Blue Cross/Blue Shield of Texas et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,
v.
Bill West et al., Defendants-Appellees.

No. 74-1374.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1975.

Physician brought action seeking damages for alleged malicious prosecution and for tortious conduct related to his alleged wrongful suspension under medicare program. The United States District Court for the Northern District of Texas, Robert M. Hill, J., granted defendants' motion for summary judgment, and physician appealed. The Court of Appeals, Dyer, Circuit Judge, held that action for damages alleging wrongful suspension of physician under medicare program brought against vice president of state medical services corporation and various HEW employees was properly removed from state court; that the district court had jurisdiction of the parties and the subject matter; and that all defendants had governmental immunity from suit.

Affirmed.

Before DYER, SIMPSON and CLARK, Circuit Judges.

DYER, Circuit Judge:

In these two cases (consolidated on appeal) Dr. Peterson sought damages for malicious prosecution and for tortious conduct related to his alleged wrongful suspension under the Medicare program. The district court granted summary judgment for the defendants. We affirm.

The first suit was filed May 8, 1973, in a Texas state court against West, Vice President of Blue Cross of Texas, Stafford and Martin, Regional and Assistant Regional Counsel, respectively, of the Department of Health, Education and Welfare, and McSteen, Gruninger, Adams and Chancellor, all H.E.W. employees, whose duty it was to insure the integrity of the Medicare program. The claims made in this suit are admittedly identical (except for malicious prosecution) with the claims made in Peterson v. Weinberger, 5 Cir. 1975, — F.2d — this day decided. Likewise, the defendants are the same in both suits except for the addition here of the defendants West, Stafford, and Martin.

The second suit filed a week later, on May 17, 1973, in a Texas state court was against Blue Cross/Blue Shield of Texas, Group Medical and Surgical Services, and Group Hospital Service, Inc. It raised the identical issues against the same corporate defendants as were included in *Weinberger, supra.* Admittedly this was a "protective" suit filed in the state court against the contingency that the federal court would determine in *Weinberger* that it was without jurisdiction over the corporate defendants.

Final judgment in *Weinberger* was entered on October 29, 1973. The district court found that Peterson had failed to

prove a claim for either breach of contract or tort damages. It further found that the agents and employees of the Government had immunity from liability because they had acted within the scope of their employment in suspending Peterson and withholding payments due him under the Medicare program because of his possible fraud. The court also found that Peterson and his brother had submitted false claims to the Government, for which they were cast in damages.

A petition for removal under 28 U.S.C.A. § 1442(a)(1),[1] was timely filed in both state court cases in behalf of all the defendants as officers, employees, and agents of the United States. The district court granted summary judgment for the Government, finding that the issues presented were identical to those resolved on the merits in *Weinberger* and therefore should not be relitigated. We have this day affirmed *Weinberger* in all respects.

Peterson makes a two-pronged attack in these cases. He contends that both cases were improperly removed and should have been remanded, *ergo* the district court was without jurisdiction to pass upon the merits. He next argues that, even if the district court had jurisdiction, the judgment in *Wienberger* does not operate as *res judicata* because in one of these suits, a new cause of action (malicious prosecution) was

[1] 28 U.S.C.A. § 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the distric court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office.

alleged, and in the other, three additional defendants were included.

Although we are strongly inclined to the view that the issues resolved in *Weinberger* were identical to the issues in these suits and are therefore *res judicata* as to the same defendants *and their privies*, we prefer to sustain the district court's judgment on the grounds that the removal of the suits was proper, the district court had jurisdiction of the parties and the subject matter, and all the defendants had governmental immunity from liability.

The defendants in these suits, except West, Stafford and Martin, were defendants in *Weinberger*. West's official capacity and his duties and responsibilities were detailed by him in that proceeding. Stafford and Martin, Regional and Assistant Regional Counsel, H.E.W., here named as co-conspirators, are alleged to have carried out the same illegal acts leading to Peterson's Medicare suspension as were attributed to the *Weinberger* defendants.

[1, 2] It is indisputable that each of the defendants was either an "officer of the United States or an agency thereof, or persons acting under him" and that their actions were "under color of such office." Peterson urges however, that what he labels as tortious conduct took the defendants beyond the scope of their statutory authority. We took some pains in *Weinberger* to relate the factual background leading to the suspension of Peterson and concluded that "[t]here is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their

employment in carrying out their official responsibilities" Peterson v. Weinberger, *supra*, at 3580. We further concluded that since the corporate defendants were simply Medicare fiscal intermediaries, acitng pursuant to a contract with the government, they were under the sovereign immunity umbrella.

[3] The purpose of the removal statute is to prevent federal officers or persons acting under their direction from being tried in state courts for acts done within the scope of their federal employment. In Willingham v. Morgan, 1969, 395 U.S. 402, 405, 89 S.Ct. 1813, 1815, 23 L.Ed.2d 396, the Supreme Court noted that "the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases when federal officials must raise defenses arising from their official duties" On this premise, the Court further noted that "the test for removal should be broader, not narrower, than the test for official immunity." *Id.* In fashioning a broad application of the statute, the Court said:

> The federal officer removal statute is not "narrow" or "limited." Colorado v. Symes, 286 U.S. 510, 517 [52 S.Ct. 635, 637, 76 L.Ed. 1253] (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. . . . This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1). *Id.* 395 U.S. at 406-407, 89 S.Ct. at 1816.

In a variety of circumstances removals under § 1442(a)(1) have been upheld; for example, Chafin v. Pratt, 5 Cir. 1966,

358 F.2d (libel and slander suit against eight employees of the Public Health Service's Communicable Disease Center); Murphy v. Kodz, 9 Cir. 1965, 351 .2d 163 (mid-air plane collision wrongful death suit against an officer of the United States Forest Service); Poss v. Lieberman, 2 Cir. 1962, 299 F.2d 358 (libel suit against a claims representative of H.E.W.); Texas v. National Bank of Commerce of San Antonio, 5 Cir. 1961, 290 F.2d 229 (*quo warranto* suit by Texas against National Bank for violation of Texas law).

[4, 5] We conclude that the defendants in the instant actions were persons acting within the purview of § 1442(a)(1) and that the suits were properly removed. Removability having been established, the district court had jurisdiction to consider the controversy. What we said in *Weinberger* concerning immunity is fully applicable here. The entry of judgments for the defendants was proper.

Affirmed.

EXHIBIT B

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Eugene PETERSON and Donald M. Peterson, Defendants-Appellants.

No. 73-1748.

United States Courts of Appeals,
Fifth Circuit.

Jan. 18, 1974.

Rehearing Denied Feb. 19 and March 29, 1974.

Prosecution of two defendants, a physician and a nonphysician, for unlawfully and knowingly making false statements of material facts to a government agency, and for conspiracy, in connection with claims for payment for physical therapy services rendered. In the United States District Court for the Northern District of Texas at Dallas, Sarah Tilghman Hughes, J., the nonphysician was convicted of substantive offenses and of conspiracy, and the physician was convicted only of conspiracy. They appealed. The Court of Appeals, Gewin, Circuit Judge, held that, in view of overwhelming evidence that the doctor did not in fact supervise the rendition of physical therapy services, evidence which might have raised a doubt as to whether the physician was required to be personally present when the services were rendered, to meet a requirement of personal supervision, was properly excluded. The Court also held, however, that evidence was

insufficient to sustain the conspiracy conviction of the physician, whose signature on the claim forms had been forged.

Affirmed in part; reversed and remanded with instructions to dismiss conspiracy count of indictment.

GEWIN, Circuit Judge:

This appeal is taken from a judgment of conviction entered against Dr. Donald Peterson for conspiring to defraud an agency of the United States Government, in violation of 18 U.S.C. § 371 (1970).[1] His brother and alleged co-conspirator, James E. Peterson, also before us on appeal, was convicted under the conspiracy charge and on a number of courts under 18 U.S.C. § 1001 (1970)[2] alleging the substantive offenses of unlawfully and knowingly making false statements of material facts to a government agency. They were tried jointly before a jury which found them guilty. The prevarication is designated as the allegedly false certification that physical therapy rendered to patients at an extended care facility was provided by Dr. Peterson or under his personal auspices. Both appellants claim that numerous evidentiary errors were committed below and challenge the sufficiency of the evidence to support the jury's verdict. Finding these contentions to be of only limited efficacy, we reverse the conspiracy convictions but affirm James E. Peterson's conviction of the substantive offenses.

I

Before addressing the issues raised on appeal, it is instructive to consider the complicated statutory and factual back-

ground which gave rise to the instant prosecutions. James E. Peterson is the owner of Concord Manor, a nursing home approved by the Social Security Administration as an extended care facility and hence qualified to receive payment for hospital benefits rendered to the aged under Title XVIII, Health Insurance for the Aged of the Social Security Act, popularly denominated the Medicare Act.[3] The Act prescribes a bifurcated scheme of remuneration to those extending aid to the elderly. Under Part A, an extended care facility making outlays for room and board and nursing services may be compensated on a per diem rate determined by agreement with its fiscal intermediary, here Mutual of Omaha.[4] Under Part B, doctors rendering physical therapy are remunerated directly by a second fiscal intermediary, here the Group Medical and Surgical Service (Blue Cross-Blue Shield). Prior to July 1, 1968, Part B. claims were required to be filed by a physician on government Form SSA-1490(2), and could not be filed by a nursing home or medical organization comprised of physical therapists.[5] The 1968 amendment, however, altered this filing and compensation procedure by enabling a group of therapists, who form an organization to provide physical therapy and enter into agreements with extended care facilities to render the therapy prescribed by a patient's doctor, to bill directly for their services. It was this amendment which spurred the organization of Zodiac, Inc. by James Peterson and the fraternal interplay between James and Dr. Peterson. At his brother's behest Dr. Peterson enlisted as medical advisor to Zodiac, responsible for drafting procedures which would enable it to qualify as a "provider of services." Upon such

qualification, Zodiac would be entitled, under the new amendment, to bill directly for costs incurred in administering physical therapy to Medicare patients.

We turn now to the occurrences which gave rise to the institution of criminal proceedings against the two defendants. During the first six months of 1968, Zodiac furnished physical therapy to patients at Concord Manor. This therapy was administered by a registered physical therapist and two therapy aides. Dr. Peterson's involvement was purportedly confined to drafting procedures for submission to the Social Security agency, pursuant to the new amendment. Nevertheless, in 1969, Group Medical and Surgical Service received requests under his name for payment of medical insurance benefits for Zodiac patients receiving physical therapy from January to June 1968. These requests were submitted on Form SSA-1490D(2), alluded to above, which in box # 14, required that the administering doctor, here Dr. Peterson, certify that he either supplied the services or had them provided under his personal direction.[6] The forms received contained Dr. Peterson's signature, subsequently learned to have been forged, his personal supplier number, and a post office box address substituted for Dr. Peterson's registered address. The change of address was intended to divert the checks from Dr. Peterson's address to that of Zodiac. This was an abortive effort because Dr. Peterson's supplier number and address were unique to him and payment would be sent to Dr. Peterson automatically notwithstanding the change of address. Ignorant of the forgery and disregarding, as required, the substituted address, Group Medical and Surgical Service remitted claims

payments to Dr. Peterson, who after depositing them in his Dallas Clinic Account, upon the same day he received them, drew a new check for the same amount payable to the order of Zodiac. Both convictions stem from the conduct engaged in with respect to the filing of the claims.

II

The fraternal bond, welded by the joint employment of Dr. James Peterson in the Zodiac endeavors, appears to have been dissipated by the advancement of divergent theories for upsetting their convictions. The only semblance of unity retained throughout this appeal is that both claim that the prosecutors and the jury made "much ado about nothing." The premise underlying James Peterson's claim is that his brother was sufficiently involved in the operations of Zodiac affairs to dispel any inference that he, James Peterson, perpetrated a fraud in filing the claims. Conversely, the premise underlying Dr. Peterson's claim is that the evidence of his involvement in Zodiac affiairs and the filing of claims is so meagre that he could not be found to have participated in the conspiracy. We consider their precise contentions advanced seriatim.

[1-4] James Peterson raises four contentions on appeal, each of which is devoid of merit. The first is that the lower court erred in excluding certain documents relating to Zodiac's qualification as a provider of services and two prior indictments which were dismissed. Second, the government's suppression of a letter from HEW addressed to Zodiac warranted reversal under Brady v. Maryland, 373 U.S. 83, 83 S.Ct.

1194, 10 L. Ed. 2d 215 (1963). And third, the lower court erred in failing to give requested charges and instructions which would have clarified the meaning of the phrase "under his personal direction." Each of these contentions fails, the first because under F.R.Cr.Proc. 26, it was within the district court's discretion to exclude the proffered evidence and such discretion was not abused in the instant case, *see* United States v. Twilligear, 460 F. 2d 79, 81 (10th Cir. 1972); United States v. Skillman, 442 F. 2d 542, 551 (8th Cir.) cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L. Ed. 2d 63 (1971), the second, because James Peterson's characterization of the government's action with respect to the HEW letter as suppression is illusory, and the third, because the trial judge's instructions encompassed the substance of what James Peterson desired to have the court propound to the jury. A more formidable impediment to the efficacy of these evidentiary arguments is that the excluded evidence would be germane only if the theory upon which his defense is predicated were viable. This theory is that the meaning of the terminology "under his personal direction" contained in box 14 of Form SSA-140D(2) was ambiguous and hence any misrepresentation in filing the claims for payment was attributable to inadvertence and not to willfulness. The excluded evidence arguably gave credence to the view that some ambiguity prevailed.[7] However, whatever force his theory has derives largely from its generality, for the overwhelming evidence established that Dr. Peterson did not in fact supervise the administering of physical therapy to any particluar Zodiac patients. The inefficacy of his theory inveriably condemns James Peterson's fourth

challenge, raised below through a motion for judgment of acquittal, and pressed here that the evidence was insufficient to support the jury's finding that he had made willful misrepresentations on the claim forms filed with Group Medical and Surgical Service. Evidence of Dr. Peterson's non-involvement in administering physical therapy clearly supports the jury's finding in this regard. Thus, James Peterson's conviction on the substantive counts must stand.

Dr. Peterson objects on appeal to two evidentiary rulings[8] and the sufficiency of the evidence to support the jury's finding that he participated in a conspiracy to defraud the government. He had raised this sufficiency objection in the district court by means of a motion for judgment of acquittal when the government rested its case, again when James Peterson rested his defense and reiterated it when all parties had closed their testimony by way of an objection to the submission of the case under the district court's charge. We confine our resolution to the sufficiency grounds.

Under established judicial precedent, a jury verdict must be sustained if there is sugstantial evidence when viewed in a light most propitious to the government, to support it. *See* Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L. Ed. 680 (1942); United States v. Hernandez, 484 F. 2d 86, 87 (5th Cir. 1973); United States v. Arroyave, 477 F. 2d 157, 163 (5th Cir. 1973); Lacaze v. United States, 391 F. 2d 516, 519 (5th Cir. 1968). This rule, while dictating that deference be extended to jury findings, does not immunize them from attack. An examination of the evidence convinces

us that Dr. Peterson's challenge is well-founded.

[5] In reviewing the evidence marshalled by the government in support of the conspiracy charge, it is critical to note that conduct of Dr. Peterson subsequent to the time that claims were filed with Group Medical and Surgical Service is germane only to the extent that such conduct supports the inference that he had planned with James Peterson to file the claims containing the misrepresentation. Since the conspiracy had run its course *eo instante* upon the filing of these claims, Dr. Peterson's conduct upon receipt of checks in payment of claims could not constitute an overt act in its furtherance.[9] *See* Bollenbach v. United States, 326 U.S. 607, 611, 66 S. Ct. 402, 404, 90 L. Ed. 350, 353 (1946).

[6] The record is devoid of evidence, prior to Dr. Peterson's receipt of claims checks from Group Medical, which supports the conclusion tha the had engaged in the alleged conspiracy.[10] Dr. Peterson steadfastly adhered to the position that he never directed the administering of physical therapy to Medicare patients and that he was ignorant of the forgery of his signature on Form SSA-140D(2). His testimony was corroborated by Helen Maeker, the registered physical therapist, and Lucille Morton, the secretary who at James Peterson's behest, forged Dr. Peterson's signature and attempted to substitute a post office box number for Dr. Peterson's registered address listed on the claims form.[11] Moreover, it is uncontroverted that Dr. Peterson expressly disavowed any intention to bill for services performed by Zodiac during his abbreviated affiliation and that he severed relations with Zodiac

after July 1, 1968, a substantial period of time before March 1, 1969, the date the alleged conspiracy transpired. Finally, there is no evidence that he saw, much less conversed with James Peterson after his disaffiliation, other than upon the day the claims checks were remitted to him. Hence, the jury verdict can only be sustained if Dr. Peterson's conduct upon receiving the checks supports the inference that he had pre-ordained the false filing engineered by James Peterson.

The evidence adduced by the government at trial established that upon receipt of payment checks from Group Medical totaling $18,000, Dr. Peterson reported their arrival to his brother, deposited them in his clinic account, personally wrote a new check designated accounts payable to Zodiac for the entire amount and delivered it to Zodiac on the very same day.[12] Dr. Peterson admitted that he took this action without making any attempt to contact Group Medical and Surgical Service about the checks and despite the fact that he knew the claims did not involve any of his own patients and that he had not authorized submission of the claims in his own name. The government also attributed significance to testimony elicited on cross-examination of Dr. Peterson which in allegedly impugning his credibility, reflected upon the mendacity of his assertions of noninvolvement in the claims filed.[13]

The countervailing evidence and that which compels the conclusion that the jury's inference of conspiracy must be set aside revolves around the actions of the alleged confederate, James Peterson. His conduct, in forging his brother's

signature, in supplying his supplier number, and in altering his registered address on the claims filed with Group Medical reflects a protracted effort to divert the checks from Dr. Peterson. Such an effort would appear to be inexplicable if Dr. Peterson were involved in the scheme. In Short, Dr. Peterson's conduct appears to be more pickwickian than conspiratorial.

Moreover, we cannot overlook the fact that Dr. Peterson was exonerated of the charges contained in the 39 substantive counts of the indictment. Concededly, a conspiracy to commit a crime is a separate and distinct crime from the substantive offense. *See* Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L. Ed. 2d 312, 317 rehearing denied, 365 U.S. 825, 81 S.Ct. 687, 5 L. Ed. 2d 703 (1961); United States v. Jasso, 442 F. 2d 1054, 1056 (5th Cir.), cert. denied, 404 U.S. 845, 92 S.Ct. 146, 30 L. Ed. 2d 81 (1971); Downing v. United States, 348 F. 2d 594, 600 (5th Cir.), cert. denied, 382 U.S. 901, 86 S.Ct. 235, 15 L. Ed. 2d 155 (1965). But this distinction may become tenuous where, after receiving an "aiding or abetting" charge, a jury exonerates a defendant on the substantive count the elements of which closely approximate, if not parallel, the overt acts alleged in the conspiracy charge. We do not mean to suggest that were additional evidence of conspiracy adduced at trial a jury verdict of guilty on the conspiracy count alone would invaiably require reversal. Rather, based on the unique facts presented in the record, it is difficult to conceive of how the jury could exculpate Dr. Peterson as an aider or abettor but yet inculpate him as a confederate.

III

[7, 8] For the aforementioned reasons, we hold that the jury lacked sufficient evidence to find Dr. Peterson guilty of conspiracy to defraud an agency of the United States Government. Concomitantly, since this absolution removes James Peterson's confederate, his conviction on the conspiracy charge must also be reversed. Since neither appellant joined a motion for a new trial with their motions for judgment of acquittal, the appropriate disposition is to reverse and remand with directions that the indictments be dismissed as to the conspiracy counts.[14] *See* United States v. Apollo, 476 F. 2d 156, 158 n. 1 (5th Cir. 1973); United States v. Musquiz, 445 F. 2d 963, 966 (5th Cir. 1971); 2 Wright, Federal Practice & Procedure § 470 (Supp. 1973). Since we discern no infirmity in James Peterson's conviction on the substantive counts, we affirm as to that part of the judgment of conviction.

Affirmed in part; reversed and remanded with instructions to dismiss the conspiracy count of the indictment.

EXHIBIT C

Donald M. PETERSON, Plaintiff-Appellant,

v.

Caspar W. WEINBERGER, Secretary of Health, Education and Welfare, et al., Defendants-Third-Party Plaintiffs-Appellees,

v.

James E. PETERSON, Third-Party Defendant-Appellant.

No. 74—1067.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1975.

Physician brought action for alleged wrongful withholding of funds due him under the Medicare Act. The government filed a counterclaim against the physician and a third-party complaint against operator of nursing home for submission of false medicare claims. The United States District Court for the Northern District of Texas, Robert M. Hill, Jr., 370 F.Supp. 1259, rendered judgment in favor of the government and appeals were taken. The Court of Appeals, Dyer, Circuit Judge, held that conduct of employees of Bureau of Health Insurance in suspending physician from medicare program after investigation revealed possible fraud in submission of medicare claims was not melicious, negligent or unreasonable; that withholding of funds due physician as offset against false claims under investigation did not deny due process; and that evidence sustained determination that physician and

operator were liable to the United States under False Claims Act.

Affirmed.

Appeals from the United States District Court for the Northern District of Texas.

Before DYER, SIMPSON and CLARK, Circuit Judges.

DYER, Circuit Judge:

James E. Peterson and his brother, Dr. Donald M. Peterson, appeal from a money judgment entered against them for submitting false claims against the Government. Dr. Peterson also appeals from the denial of his entitlement to injunctive relief and tort and breach of contract damages against the defendants. We affirm.

Although much of the complicated statutory and factual background of this and the cognate cases[1] has been treated in the district court's opinion,[2] and in this Court's opinion on the appeal of the criminal trial of the Peterson brothers,[3] a recount of the salient facts is helpful to focus upon the issues raised by the Petersons.

James Peterson was the president, director, and a 69 per cent stockholder of Concord Manor Nursing Home, an extended care facility. He was also the sole owner of Zodiac Enterprises, Inc., which contracted with Concord and other nursing homes to provide physical therapy services to their

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[1] Peterson v. Blue Cross and Peterson v. West, 5 Cir. 1975,— F.2d —, this day decided.

[2] Peterson v. Richardson, N.D. Tex. 1973, 370 F.Supp. 1259.

[3] United States v. Peterson, 5 Cir. 1974, 488 F.2d 645.

patients. In 1968, Concord was a certified provider of services under Part A of the Medicare program. Medicare payments were handled through a fiscal intermediary, Mutual of Omaha, to whom Concord submitted its bills for services rendered at the nursing home at a daily rate which included physical therapy. Zodiac could not submit bills for its physical therapy services directly to the Medicare intermediary because Zodiac and Concord were related corporations, *i. e.*, James Peterson was the sole owner of one and held the controlling interest in the other. Therefore, the only way Zodiac could be reimbursed by Medicare for its services was for Concord to include physical therapy in its bills to Omaha. Only the cost, without profit, of services rendered was reimbursable. Concord was required to file cost reports each year with Omaha so it could determine the appropriate allowable cost. Concord failed to file these reports for 1967, and after three notices and the reduction of allowable daily rates, payments were stopped on March 1, 1969, and it ceased being a provider on August 31, 1969.

Thus, early in 1969, James Peterson was faced with a dilemma regarding physical therapy services: Zodiac could not bill directly for therapy services it had furnished to Concord in the first six months of 1968, and payments to Concord under Part A had been stopped. Thereupon, Peterson directed his employee, Morton, to prepare Part B claim forms and "get them out as soon as possible so he could get the money back in." This necessitated the use of a form different from that used for Part A in that it required a

physician's personalized provider number and the physician's signature certifying that the service had been rendered by him personally or under his personal direction. Morton and another employee prepared 120 Part B claims, signed Dr. Peterson's name and provider number to them, and put James Peterson's Post Office box number on the forms rather than Dr. Peterson's address. Morton testified that "Mr. Peterson gave us the instructions on all of the forms."

The Part B claims for Medicare payments were then sent to Blue Cross/Blue Shield of Texas which operated the Medicare program as an agent of the United States on a non-profit basis pursuant to a written contract executed under the provisions of 42 U.S.C.A. §§ 1395th and 1395u. All of the claims were paid by checks made payable to Dr. Peterson and mailed to him.

The circumstances surrounding Dr. Peterson's receipt and handling of the checks are far from clear. He testified that he assumed the checks were made out and sent to him because he was the medical director of Zodiac. He called his brother to find out why he got checks for physical therapy that he had not billed. James Peterson told him that "the claims had been filed." The doctor didn't ask why the checks had been made to him, nor did he contact Group Medical. He simply told James Peterson that he would forward the funds. Instead of endorsing the checks, Dr. Peterson deposited them to his own account and sent his personal check with a notation "account payable" to James Peterson, who deposited it in the Zodiac account.

Dr. Peterson was not on the payroll of Zodiac. He knew that the 120 checks payable to him did not belong to him. He knew he had never personally rendered any of the services in question. Subsequently and inexplicably, Dr. Peterson received six invoices from Zodiac for the therapy services rendered during the first six months of 1968 at Concord which comprised the 120 claims. Dr. Peterson did not pay the amount of the invoices because he "didn't think he owed the money." James Peterson's version was that Dr. Peterson had been billed for physical therapy services rendered while the doctor was medical director of Zodiac. He claimed that Dr. Peterson's check was in payment of the invoices. This is inexplicable because Dr. Peterson sent his check to James Peterson on June 3, 1969, and the Zodiac invoices were not prepared or sent to Dr. Peterson until July, 1969. Moreover, neither James Peterson nor Dr. Peterson could give any plausible explanation why Zodiac should bill its medical director for services its physical therapy department performed. Finally, also without explanation was the notation on Dr. Peterson's check to Zodiac, "account payable."

In July, 1969, a complaint was received by Gruninger, Program Integrity Specialist, Bureau of Health Insurance, Department of Health, Education and Welfare. The niece of a Medicare beneficiary at Concord questioned the payment to Dr. Peterson for physical therapy services not rendered by him. There followed an investigation concerning claims filed over the signature of Dr. Peterson for physical therapy rendered at Concord for the first six months of 1968 and sub-

mitted for payment in April of 1969. The investigation revealed that although Dr. Peterson's name appeared on the claim forms, he had not personally rendered the services, nor had they been performed under his personal direction. In December, 1969, because of the possibility of fraud, Gruninger issued a letter to Blue Cross/Blue Shield ordering suspension of further payments to Dr. Peterson under the Medicare program. In May, 1970, a conference was held with Dr. Peterson in which he was given an opportunity to respond to accusations made against him. Through counsel he subsequently replied by letter. The suspension, however, remained in effect.

Dr. Peterson responded by filing suit seeking to enjoin the defendants from wrongfully withholding funds due him under the Medicare Act. He also alleged that certain torts precipitated his suspension from the Medicare program. The Government filed a counterclaim against Dr. Peterson and a third party complaint against James Peterson for submission of false claims. A criminal indictment was also returned against the Peterson brothers which resulted in the conviction of both on one count of conspiracy, and of James Peterson on 39 substantive counts of submission of false claims (representing 39 of the 120 claims in the instant suit). On appeal this Court affirmed the conviction of James Peterson on the substantive counts and reversed the conviction of both Petersons on the conspiracy count.[4]

[4] See not 3 *supra*. The Court found that the jury lacked sufficient evidence to find Dr. Peterson guilty of conspiracy; reversing his conviction removed James Peterson's confederate, so the latter's conviction for conspiracy was also reversed.

Upon the trial of Dr. Peterson's complaint and the Government's counterclaim and third party claim, the district court found that Dr. Peterson was entitled to neither injunctive relief, nor tort or breach of contract damages against any of the defendants, and dismissed his complaint. The major portion of the trial was then devoted to the Government's claims. The court found that the Peterson brothers had violated the False Claims Act, 31 U.S.C.A. § 231, by knowingly submitting to the Government 120 false claims totaling $16,153.44, and thereupon entered a joint and several judgment for $31,606.72 representing double damages, together with the sum of $100,000 representing a $2,000 forfeiture for 50 of the 120 claims in question, with interest awarded from the date of judgment.

Dr. Peterson's Tort Claims

We first turn to Dr. Peterson's prayer for compensatory and punitive damages for the alleged tortious conduct of the defendants. He asserts that the Government and the individual defendants conspired to destroy him and to make it impossible for him to practice as a physician, and that the defendants took his property wihtout due process, and wrongfully and maliciously interfered with his contractual rights. To support these charges, Dr. Peterson argues that he was wrongfully suspended from the Medicare program without notice or a hearing by employees of the Bureau of Health Insurance, H.E.W., who had no authority to impose sanctions, and that this was accomplished as a part of a conspiracy with the Government. Further, he complains that he was required to respond to criminal indictments and defend himself in a

criminal trial as well as defend against the Government's counterclaim for liability under the False Claims Act in the instant suit.[5]

[1] We have combed the record to find some basis for the numerous claims of tortious conduct on the part of the defendants and can find no evidence to support any of them. Evidence of a conspiracy between the Government and the individual and corporate defendants is non-existent. The suspension of Dr. Peterson and the withholding of payments due him by H.E.W. employees were actions both appropriate and necessary under instructions requiring the immediate suspension of any doctor participating in the Medicare program upon the discovery of possible fraud in the submission of claims under the Act. Bureau of Health Insurance Identical Memorandum No. 176, June 11, 1969. There is not a scintilla of evidence that the actions taken by the Bureau of Health Insurance employees were prompted by any reason other than to protect the integrity of the program. The corporate defendants, as fiscal intermediaries, did no more than act on the instructions received by them. This they were required to do. Convinced, as we are, that Dr. Peterson caused false claims to be made, we agree with the district court that the conduct of the defendants was neither malicious, negligent, nor unreasonable in the circumstances.

[2] Finally, we are unpersuaded that Dr. Peterson's property was taken without due process. His argument, premised

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[5] Dr. Peterson has conceded that the Government is not liable under the Federal Tort Claims Act for maalicious prosecution and interference with contract rights. See 28 U.S.C.A. § 2680(h).

upon Goldberg v. Kelly, 1970, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed. 2d 287, is that H.E.W. was not entitled without a hearing to withhold funds due him under Medicare as an offset against false claims then under investigation.

We note that the district court, by preliminary injunction, ordered the withheld funds paid to Dr. Peterson upon his posting of a bond to indemnify the Government should the claims indeed prove false. This was accomplished. Since the funds were no longer held by the Government, this removes this case from the parameters of *Goldberg*. In any event, Dr. Peterson's argument is laid to rest by our decision in Hilburn v. Butz, 5 Cir. 1972, 463 F. 2d 1207. There, the Hilburn family were concededly owed money under various Department of Agriculture programs. After an investigation, the Secretary administratively determined that the Hilburns had been overpaid under the same programs in previous years and that the monies presently owed them should be applied to offset such overpayments. We held that the Secretary had the right to withhold current funds equal to the overpaid funds, at least until the issues relating to the overpayments were judicially determined. Judge Clark, reasoning in a manner eminently appropriate to this case, held *Goldberg* inapplicable saying:

> The result in Goldberg v. Kelly was based on a judicial notice of the fact that welfare recipients as a class would be deprived of their very means of existence while awaiting the outcome of a post-termination hearing. In turn, those recipients' necessary search for daily subsistence would adversely affect their ability to seek redress from the welfare bureaucracy. No evidence of any such dire consequences was adduced in this case. Hilburn v. Butz, 463 F. 2d at 1209.

We conclude that there was no denial of due process, and that Dr. Peterson wholly failed to prove tortious conduct on the part of any of the defendants; the district court properly entered judgment in their favor.

Immunity from Liability

The defendants urged the district court to dismiss Dr. Peterson's amended complaint for tort liability on the ground of official immunity. The court declined to do so at that stage of the proceedings, but, after hearing all of the evidence, concluded that their claim of immunity was well taken. We agree.

[3, 4] With respect to defendants, Secretary of H.E.W. and the United States of America, there can be no question that this was an unconsented suit against the sovereign over which the court lacked jurisdiction. The individual defendants were all employees of the Bureau of Health Insurance, Department of Health, Education and Welfare. McSteen was the Regional Representative responsible for the administration of the Medicare program in five states, including Texas. Adams supervised all of the work on fraud and abuse cases, including Dr. Peterson's case. Gruninger was a program integrity specialist whose responsibility it was to investigate claims of fraud and abuse and forward them for prosecution where indicated. Chancellor was also on the program integrity staff of the Dallas, Texas, regional office. He had the responsibility of contacting the families of beneficiaries who had been billed for services by Dr. Peterson. Dr. Peterson's case was processed and investigated in precisely the same manner as

other suspected fraud cases. His suspension was effected as required by Bureau of Health Insurance Identical Memorandum No. 176, June 11, 1969.[6] Peterson's argument that the individual defendants were guilty of gross negligence in improperly imposing sanctions on the wrong person, without just cause, in conspiracy with one another and with the Government, and outside the scope of their employment, is wholly unfounded. There is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their employment in carrying out their official responsibilities.

We find equally without merit Dr. Peterson's contention that the individual defendants were lower echelon employees who are not entitled to claim immunity. In the seminal case of Barr v. Matteo, the Supreme Court reasoned that:

> The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. (footnote omitted.) . . . It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," Spaulding v. Vilas, *supra*, 161 U.S. [483,] at 498, [16 S.Ct. [631,] at page 637], 40 L. Ed. 780—

[6] The Memorandum provides in pertinent part: "Where cases of potential fraud are uncovered, the carrier should be instructed by the R.O. [Regional Office] to withhold payments in all pending assigned claims from the 'suspect' until the investigation is completed and conclusion reached as to whether fraud was perpetrated and, if so, what further action is to be taken."

> which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. (1959), 360 U.S. 564, 573—574, 79 S.Ct. 1335, 1340—1341, 3 L. Ed. 2d 1434.

Pared of distracting shadow contentions, the acts complained of were

> the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability.

Norton v. McShane, 5 Cir. 1964, 332 F. 2d 855, 859, citing with approval Ove Gustavsson Contracting Co. v. Floete, 2 Cir. 1962, 299 F. 2d 655, cert. denied, 374 U.S. 827, S.Ct. 1862, 10 L. Ed. 2d 1050. *See also* Scheuer v. Rhodes, 1974, 416 U.S. 232, 94 S.Ct. 1683, 40 L. Ed. 2d 90; Chafin v. Pratt, 5 Cir. 1966, 358 F. 2d 349. The alleged tortious acts were committed by agents of the Government responsible for the integrity of the Medicare program during the course of an investigation of purported violations of the Medicare Act; all the agents were shielded by immunity. Waymire v. Deneve, 5 Cir. 1964, 333 F. 2d 149.

[5] We need not tarry long with respect to the asserted tort liability and the immunity of the corporate defendants. They are Medicare fiscal intermediaries who act as agents at the sole direction of the Secretary of Health, Education and Welfare pursuant to 42 U.S.C.A. §§ 1395h and 1395u.[7] In

[7] Under regulations promulgated by the Department it is provided that "In the performance of their contractual undertakings, the carriers act on behalf of the Secretary, carrying on for him the administrative responsibilities imposed by the law. The Secretary, however, is the real party in interest in the administration of the program. . . ." 20 C.F.R. § 405.670 (1973).

this situation the United States is the real party in interest. Under the doctrine of sovereign immunity, the district court lacked jurisdiction over all these defendants, both governmental and private as agents of the Governt. *CF.* Pine View Gardens, Inc. v. Mutual of Omaha Insurance Co., 1973, 158 U.S.App.D.C. 294 485 F. 2d 1073; Johnson v. Johnson, E.D. Pa. 1971, 332 F. Supp. 510; Kuenstler v Occidental Life Insurance Company, C.D. Cal. 1968, 392 F. Supp. 532.

Government's Counterclaim and Third Party Complaint

[6] By its counterclaim and third party complaint, the Government sought recovery against the Peterson brothers under the False Claims Act, 31 U.S.C.A. § 231. As a common defense they urge that the Act was not violated because the physical therapy services were performed by qualified people, the patients receiving these services were entitled to them under Medicare, there was no financial loss to the Government, and the monies paid by the Government were therefore a liability which the Government was statutorily obligated to pay. This argument is unsound.

The claim forms here involved contain a place for the signature of physician or supplier, and the statement "(A physician's signature certifies that physician's services were personally rendered by him or under his personal direction)." Each claim submitted bore Dr. Peterson's purported signature (written by Morton) certifying something that simply was not so: Dr. Peterson did not personally render the service, nor was it rendered under his personal supervision. The services were rendered by Zodiac who was not a certified provider. It

could not have been paid, had it submitted a bill to Blue Cross. Furthermore, it is abundantly clear that Dr. Peterson was not the medical director of Zodiac, nor had he any supervision over the physical therapist who actually rendered the services. In short, the services billed were plainly not "covered" services, and the Government thus paid on the basis of the false claims presented.

As a further common defense, the Petersons argue that there is no statutory or regulatory requirement for the physician's certification; thus, they contend, the certification is not material to the claim, so no liability can attach to a false certification. This contention is without merit. It is, of course, true that the statute does not prescribed the type of claim form required, but it does provide that under Part B the services must be performed by a physician or as an incident to a physician's service. It was entirely reasonable and necessary for the Government to require such a certification on the claim forms to implement the Act, and at the same time protect public funds. Obviously, a false certification on the claim form frustrated the Government's attempt to process only valid claims and led to the payment for services which were not covered or payable under the Act.

[7] James Peterson next argues that "there is no delineation as to whether the court found a 'false' statement or a 'fraudulent' statement. Further, there is no distinction as to the falsity or the fraudulence of the 'claim,' or whether there was a 'claim.' " This is a futile exercise in semantics. A claim is within the purview of the False Claims Act if it is

grounded in fraud which might result in financial loss to the Government. Simply stated:

> This remedial statute reaches beyond "claims" which might belegally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. United States v. Neifert-White Co., 1968, 390 U.S. 228, 88 S.Ct. 959, 962, 19 L. Ed. 2d 1061.

The inclusiveness of the statute was spelled out in United States ex rel. Marcus v. Hess, 1943, 317 U.S. 537, 63 S.Ct. 379, 87 L. Ed. 443.

> These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government 317 U.S. at 544-545, 63 S.Ct. at 384.

[8] Finally, James Peterson faults the Government for failing to bear its burden of proving *scienter;* he claims the evidence did not demonstrate his personal knowledge and participation in the false certification of the claims. In restating the applicable test, we said in United States v. Aerodex, Inc., 5 Cir. 1972, 469 F. 2d 1003.

> The law is settled in this Circuit that to show a violation of the False Claims Act the evidence must demonstrate "guilty knowledge of a purpose on the part of [the defendant] to cheat the Government," United States v. Priola, 272 F. 2d 589, 594 (5th Cir. 1959), or "knowledge or guilty intent," United States v. Ridglea State Bank, 357 F. 2d 495, 498 (5th Cir. 1966). *See also* Henry v. United States, 424 F. 2d 677 (5th Cir. 1970). 469 F. 2d at 1007.

James Peterson insists that he did not instruct Morton to

sign Dr. Peterson's name to the forms but simply told her "to get them out as soon as possible." It was Dr. Peterson's responsibility, so James Peterson contends, to prepare and sign the forms as Medical Director of Zodiac, but the preparation of the forms was done by Concord personnel as a convenience because the records were kept there. We are convinced, however, that the record fully supports the district court's finding that Morton signed Dr. Peterson's name and provider number and James Peterson's post office box number to the claims at the direction of James Peterson. We are equally convinced, for the reasons we have previously stated, that Dr. Peterson was not the medical director of Zodiac and that this was a title trumped up in an effort to circumvent the requirements of the Act. There was ample evidence to conclude that James Peterson had knowledge or guilty intent to make false claims against the Government.[8]

We have considered the additional attacks made by James Peterson on the findings of fact. They raise immaterial discrepancies that cannot be parlayed into a reversal. The findings are not clearly erroneous. McAllister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. On the contrary, they have substantial support in the record. The

[8] On almost parallel evidence James Peterson was convicted on 39 counts under 18 U.S.C.A. § 1001 of the substantive offenses of unlawfully and knowingly making false statements of material facts to a government agency. This Court held that the overwhelming evidence established that Dr. Peterson did not in fact supervise the administering of physical therapy to any particular Zodiac patients, and that the evidence was sufficient to support the jury's finding that James Peterson had made willful misrepresentations on the claim forms filed with Group Medical and Surgical Service. United States v. Peterson, 5 Cir. 1974, 488 F.2d 645.

other errors asserted by James Peterson do not merit discussion.

Dr. Donald Peterson argues (in addition to the common defenses raised with his brother) that he is not personally liable under the False Claims Act because he had neither the intent to cause a financial loss to the Government nor the knowledge that the claims submitted by James Peterson contained a false or fraudulent statement. To support his argument, Dr. Peterson points out that he served as the medical director for Zodiac for the first six months of 1968. He knew the checks he received were for physical therapy services rendered by Zodiac at Concord and therefore thought this money belonged to Zodiac. He paid the money to Zodiac in good faith, knowing nothing about the contents of the claims filed. If this were the end of the story, Dr. Peterson would surely not be liable under the Act. But the parlous journey he began does not come to an end so quickly.

Not later than the first week in May of 1969, Dr. Peterson received from Group Medical and Surgical Service 120 individual checks made out to him totaling $15,803.36. Of these, 110 checks were dated April 28, 1969, and 10 checks were dated either May 1 or 2, 1969. Attached to each check was an "Explanation of Medicare" which set forth the name of the patient, that the services were provided by D. M. Peterson, D.O., his unique identifying number, the date and amount of the charge submitted, the amount allowed, the fact that the funds were assigned to the doctor, and the total amount of the Medicare payment. This "Explanation" and the accompany-

ing check, made payable to D. M. Peterson, D.O., were sent to Dr. Peterson at his correct address in Dallas, Texas. For some reason, left unexplained in the record, the checks were not deposited until June 9, 1969, over a month after their receipt. In the meantime, however, on June 3, 1969, six days before depositing the 120 checks, Dr. Peterson sent to James Peterson his personal check made to Zodiac.

[9] We reiterate that the district court was fully justified in finding that Dr. Peterson was not the medical director of Zodiac. He had no basis for assuming that the checks were sent to him because he was the medical director of Zodiac. On the contrary, the Medicare Explanation accompanying each check indicated that the claim was being paid to him personally and that the services were provided by him, under his unique identifying number, when in fact they were not. Under the circumstances, we agree with the district court that the act of Dr. Peterson in endorsing the checks and depositing them with the knowledge that he was not entitled to the proceeds was for the purpose of aiding James Peterson in obtaining payment and constitutes the making of a false claim as to each check. By this maneuver James Peterson and Zodiac ended up obtaining Government funds to which they were not entitled. The payment of the 120 claims would never have been questioned except for the complaints of patients who had never heard of Dr. Peterson.

Other Errors Asserted by Dr. Peterson

[10] Dr. Peterson complains that the district court erred in refusing to enter judgment for him for the sums, plus inter-

est, due him that were withheld during his suspension from the Medicare program. This issue is no longer viable. The district court granted a preliminary injunction in favor of Dr. Peterson, ordering that the Government pay him all sums due on claims which had been filed, and conditioned upon his posting a bond to secure the amount of any set-off that might ultimately be due the Government on its counterclaim. The bond was posted and Dr. Peterson received his money. Dr. Peterson is not entitled to interest for the period that the sums were withheld. "It is well established that the United States is not liable for interest in the absence of a contractual or statutory requirement to pay interest." United States v. Delaware Tribe of Indians, 170, 427 F.2d 1218, 1222, 192 Ct.Cl. 385. There is not statutory provision for the payment of interest under 42 U.S.C.A. § 1395, 28 U.S.C.A. § 1331, or 28 U.S.C.A. § 1361.

[11, 12] Next, Dr. Peterson argues that he was denied a fair trial because the court changed the order of proof, unduly limited his time for presenting his case, and acted as trial attorney for the Government. These charges border on the frivolous. The district court properly required that liability be established before proof of damages was offered, and it was within the court's discretion, which was soundly exercised, to initially try the issues raised by the counterclaim. Each witness offered on that phase of the case was, however, subjected to examination and cross-examination, without time limitation, in support of Dr. Peterson's claims of tortious conduct. Finally, the record is devoid of the slightest sugges-

tion that the court was an advocate for the Government. Moreover, these and other evidentiary errors asserted by Dr. Peterson were not the subject of objection below and cannot be raised for the first time on appeal. D. H. Overmyer Co. v. Loflin, 5 Cir. 1971, 440 F.2d 1213.

Dr. Peterson's contention that he was denied due process in connection with the suspension of his Medicare payments is unfounded. There is no administrative procedure prescribed by statute or regulation for suspension of Medicare recipients suspected of fraud. They, of course, have recourse to the courts for review of the action taken. Aquavella v. Richardson, 2 Cir. 1971, 437 F.2d 397. Here Dr. Peterson received a full hearing on the Government's claim of fraud.

Without further extending this opinion is is sufficient to say that he have carefully considered the various other issues raised by Dr. Peterson and find them meritless.

The Government's Asserted Errors

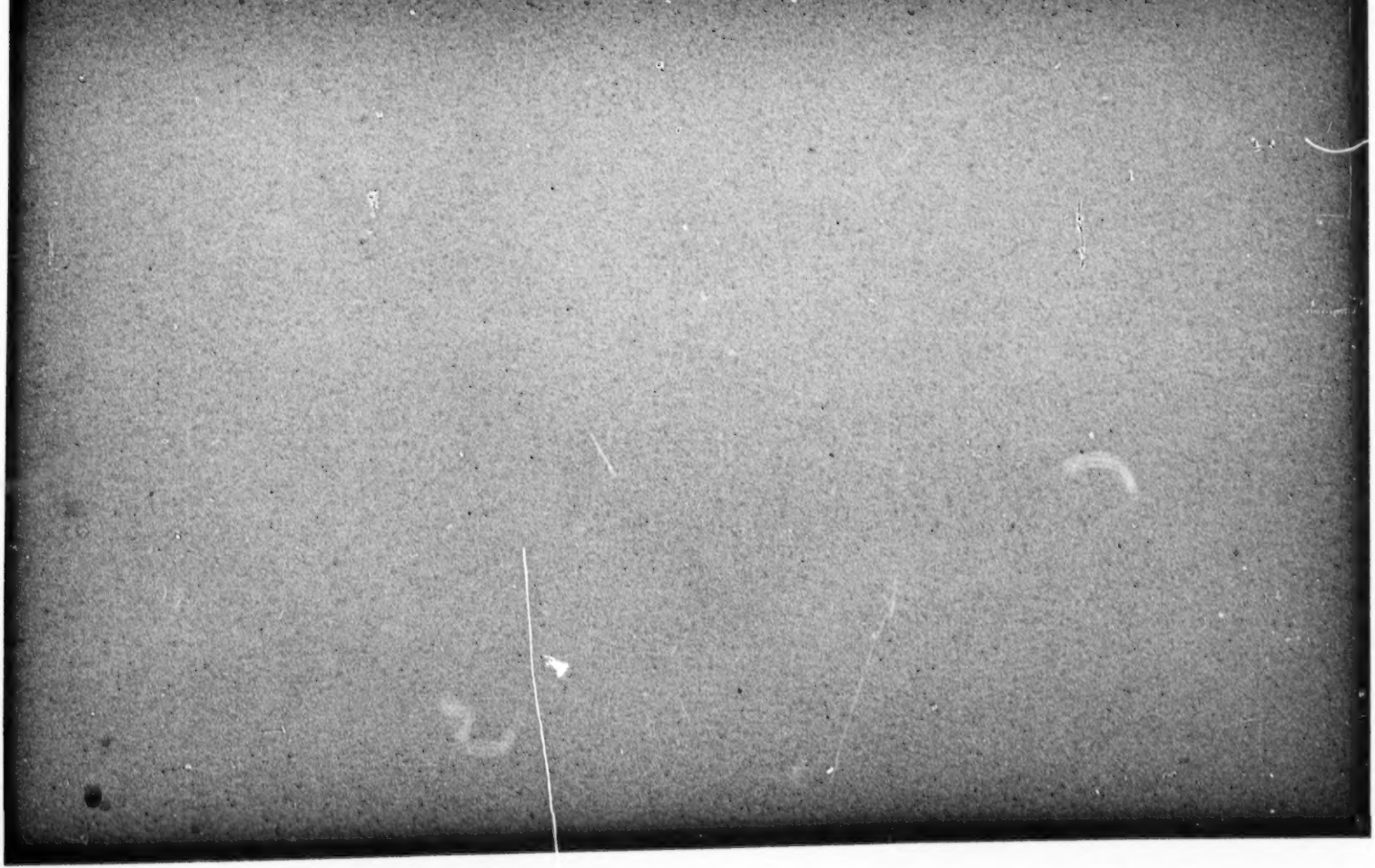
[13, 14] The Government urges that the district court erred in refusing to award interest on the fraudulent claims from the date the payment was made to the Petersons. We disagree. We subscribe to the view that since double damages, plus a specified sum, was provided in the False Claims Act for the purpose of making sure that the Government would be made completely whole, it is error to assess prejudgment interest on the recoverable amount. United States v. Foster Wheeler Corp., 2 Cir. 1791, 447 F.2d 100.

[15, 16] Finally, the Government argues that since the

district court found that 120 false claims had been filed, it should have assessed a $2,000 forfeiture for each false claim, or a total of $240,000, as provided in 31 U.S.C.A. § 231, instead of limiting the forfeiture to 50 claims totaling $100,000. The short answer is that the Government did not file a cross-appeal and may not now be heard to complain of the judgment entered below. In any event, the Government tacitly admits that the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government. The forfeiture should reflect a fair ratio to damages to insure that the Government completely recoups its losses. United States v. Hess, *supra;* Toepleman v. United States, 4 Cir. 1959, 263 F.2d 697. The district court used sound discretion in the imposition of forfeiture in this case.

We are satisfied that the issues were fully and fairly tried. The findings of fact have substantial support in the record are are not clearly erroneous. Proper legal conclusions were reached by the district court. Finding no error the judgment is

Affirmed.



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In The

Supreme Court of the United States

OCTOBER TERM, ...

No. 74-1360

DONALD M. PETERSON,
Plaintiff-Appellant,

v.

Blue Cross/Blue Shield of Texas, Inc
~~GROUP MEDICAL & SURGICAL SERVICE and~~
~~GROUP HOSPITAL SERVICE, INC.~~
~~*Defendants-Appellees,*~~

* * *

DONALD M. PETERSON,
Plaintiff-Appellant,

v.

BILL WEST et al.
Defendants-Appellees.

An Appeal from the United States Court of Appeals for the Fifth Circuit

Appendix to Petition
~~STATEMENT OF JURISDICTION~~

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In The

Supreme Court of the United States

OCTOBER TERM, ...

No.....

DONALD M. PETERSON,
Plaintiff-Appellant,

v.

GROUP MEDICAL & SURGICAL SERVICE and
GROUP HOSPITAL SERVICE, INC.
Defendants-Appellees,

* * *

DONALD M. PETERSON,
Plaintiff-Appellant,

v.

BILL WEST et al.
Defendants-Appellees.

An Appeal from the United States Court of Appeals for the Fifth Circuit

STATEMENT OF JURISDICTION

OPINION BELOW

The opinion of the lower court, the United States Court of Appeals for the Fifth Circuit is reported in West's Federal Reporter service at 508 F2d 55. A copy is included herein as Exhibit B. The appellate court's opinion was issued on Febru-

ary 14, 1975, and appellant's petition for rehearing was denied on March 26, 1975, Exhibit D.

The Federal district court disposed of these proceedings by orders, which were not reported, but are included as Exhibits A-1 and A-2.

STATEMENT OF GROUNDS FOR JURISDICTION

The jurisdiction of the U.S. Supreme Court is invoked here, pursuant to 28 USC Sec. 1254(1). The appellant proceeds by a petition for writ of certiorari after rendition of a judgment in this case by the U.S. Court of Appeals for the Fifth Circuit.

This case started in the court system in the State of Texas, where Plaintiff-appellant (Dr. Donald M. Peterson) filed two civil cases. The first petition (Tex. 73-3449) was filed against Bill West and six other individuals for tort damages resulting from wrongful interference with the physician's medical practice. The second petition (Tex. 73-3705) is against two different Dallas insurance companies, to collect medical fees being wrongfully withheld and to recover tort damages. The two insurance companies do business under the name of Blue Cross/Blue Shield of Texas. One insurance company is a Medicare Intermediary, the other is not. All parties are residents of Dallas, Texas.

As a result of petitions filed by the defendants in the Federal district court in Dallas, these cases were ordered transferred to the Federal court system. This transfer was predicated upon the authority of the statute: 28 USC Sec. 1442.

No hearings were held to prove jurisdiction, nor were any

affidavits submitted. Nor did the pleadings properly allege any facts which serve as a predicate for jurisdiction under Section 1442. Nevertheless, there clearly exists here jurisdiction with the Supreme Court, the power to construe the Federal statute involved: 28 USC Sec. 1442. In enacting this statute many years ago, the legislative purpose was to grant benefits to certain Federal employees and agents, namely, to permit certain eligible persons to transfer the forum of litigation against them to the Federal court system. Such a power (granting a right to certain agents acting for the Federal government) is certainly within the Federal governmental powers. This provision, as enacted by Congress, is in turn valid legislation, for the conditions and terms of the statute are reasonable. Thus, Federal courts may under Section 1442 exercise jurisdiction over such cases as satisfy the terms of the statute. Further, the Federal court inherently has the judicial power to

(1) construe the meaning of the wording in a Federal statute, and

(2) decide when a defendant has or has not alleged and proven up the conditions of eligibility to entitle him to benefits of the statute

It is clear, simple and undisputed here: the Federal courts have the power to decide the issue. On the other hand, it is also clear that the Federal court system does not have the power to legislate, that is, the power to rewrite the terms of the statute. In exercising this power the court of appeals erred, but clearly the U.S. Supreme Court has jurisdiction to correct this error of the lower court, because a Federal statute is involved and because the Supreme Court has appellate

jurisdiction to correct errors made by lower courts in the Federal court system.

Though the Federal court has jurisdiction to decide this controversy, Plaintiff-Appellant contends that these defendants are not eligible for the benefits of this statute and each failed to prove up with evidence his entitlement. By its terms the benefits of the statute are granted only to certain public officials and agents, and to them only for certain acts.

QUESTIONS PRESENTED ON APPEAL

Five different questions are presented by this appeal, as follows:

1—Does Section 1442 by its terms provide benefits for all Federal employees and agents as indicated by the lower court's incomplete quotation, or is the scope of the statute to be limited to that so indicated by the wording of the entire provision?

2—Did the lower courts exercise legislative powers improperly, when they amended the statute by eliminating from Sec. 1442 the material wording which otherwise would have excluded every defendant here from its entitlement of benefiits?

3—Was it error for the appellate court itself to make findings of fact, such facts being preliminary and predicate for jurisdiction over each defendant, considering the complete absence from the record of evidence and essential allegations?

4—Was it error for the court of appeals, ignoring the law

of the land *(Scheuer v. Rhodes* (1974) 416 US 232), to grant absolute and blanket immunity here to nine different defendants, none of whom submitted evidence to prove his personal defense based on immunity? Does not such judicial procedure, absent hearings, affidavits or other evidence, deprive appellant of due process, *Wood v. Strickland* (1975) — US — 43 L. Ed2d 214?

5—In dismissing appellant's actions in contract and tort based on personal defenses adjudicated in a companion case, the *Weinberger* case, the lower court erred as the *Weinberger* case (on appeal to Supreme Court) was incorrectly decided. Why is the other decision controlling here, where the causes of action and parties are different?

THE ISSUES PRESENTED ARE SUBSTANTIAL

For six different reasons the issues presented herein are substantial, and the Supreme Court should entertain this appeal.

1—The lower courts have misconstrued a Federal statute (28 USC 1442) and such error is obviously gross. Compare the incomplete quotation in footnote 1 on page 57 of the opinion (508 F2d 55, 57) with the wording in the entire code provision, Exhibit B. The lower courts made three material and important deletions, and for future litigants this error should be corrected.

2—By misquoting the Federal statute, the lower courts in effect amended its terms. The Federal courts are not em-

powered to legislate, as such action is properly to be done only by Congress, the legislative branch of government. Federal courts lack legislative powers; it was error here for the Federal courts to legislate. Considering the entire text of the statute, these defendants are not entitled to its benefits.

3—Due process of law has here been denied appellant, for the appellate court itself proceeded to make findings of fact, in the absence of any evidence. There was a total lack of evidence here, either to establish a factual predicate base for jurisdiction or to prove up the personal defenses granted each defendant. Such a judicial procedure is contrary to the U.S. Constitution, for this denies appellant his right to the judicial process *Wood v. Strickland*, supra. For example, even without allegations and evidence the appellate court made the findings of fact essential to establish jurisdiction.

4—The lower courts have failed here to follow the law of the land, as established by recent U.S. Supreme Court decisions:

(a) a personal defense based on "governmental executive immunity" must properly be established by evidence in a trial court, *Scheuer v. Rhodes, supra,* and a mere allegation thereof does not result in dismissal of a case;

(b) the procedure below is a denial of due process, because the court made an adverse decision without any hearing, *Wood v. Strickland, supra;*

(c) the court of appeals opinion is contrary to the result in an earlier Supreme Court decision, *American Fire & Cas. Co. v. Finn, infra.*

It is the responsibility of the U.S. Supreme Court to administer the Federal court system, which requires a correction of errors made by the lower courts. Otherwise, the unfollowed Supreme Court decisions are not controlling precedents, and thus are not the law of the land. As noted, the lower court decision is in conflict with Supreme Court decisions. This calls for an exercise of the Court's power of supervision.

5—This decision of the U.S. Court of Appeals for the Fifth Circuit is in conflict with another decision of the same court made on the same day, *Peterson v. Weinberger* (CA5, 1975) 508 F2d 45, on appeal to U.S. Supreme Court.

There are three companion cases involved:

1—*US v. Peterson* (CA5, 1974) 488 F2d 645,

2—*Peterson v. Weinberger* (CA5, 1975), *supra,*

3—*Peterson v. Blue Cross/Blue Shield of Texas* (CA5 1975) the instant case.

In the instant case (the third case), in order to make its decision the court of appeals depends on and relies on its findings of fact made in the second case (Weinberger), because no evidence was submitted in the instant case to prove up jurisdiction.

But in the second case the court of appeals was inconsistent, for there the court refused to accept findings of fact made in the first case *(US v. Peterson).* Instead, the court of appeals proceeded to make findings of fact and conclusions also, which are inconsistent with those in the first case. In all three cases the same fact situation is involved.

In the instant case, the court's decision was based solely on

a reliance on facts in the *Weinberger* case. But in the *Weinberger* decision, the court refused to rely on the earlier decision of the same court, as made in the first case. Incidentally, some of the material findings made by the appellate court itself in *Weinberger* are contrary to the facts proven by the evidence in the record of that case.

6—The matter of proper forum, whether state or federal courts, is important, and is a matter for certiorari, *American Fire & Cas. Co. v. Finn* (1951) 341 US 6, LEd 702. See also the removal of a case under Section 1443, *State of Ga. v. Rachel* (1966) 384 US 780, 16 L. Ed. 2d.

OPINIONS OF LOWER COURT, RELATED OPINIONS AND NOTICE OF APPEAL

The opinions of the lower courts are included herein as Exhibits, as follows:

1-Exhibit A-1: Federal district court order granting dismissal of case against the seven individuals (3-7268)

2-Exhibit A-2: Federal district court order granting dismissal of case against two insurance companies (3-7267)

3-Exhibit B: the published opinion of the U.S. Court of Appeals for the Fifth Circuit, at 508 F2d 55.

In connection with the published opinion of the lower court in the instant case, there are no separate findings of fact.

The three reported opinions in the two companion cases are as follows:

U.S. v. Peterson (CA 5,1974) 488 F2d 645;
Peterson v. Weinberger (CA 5,1975) 508 F2d 45;
Peterson v. Weinberger (D.Ct., Tex. 1973) 370 F. Supp. 1259.

Attached hereto is a copy of the notice of appeal, Exhibit E, which was filed with the U.S. Court of Appeals for the Fifth Circuit on or before April 7, 1975.

CONCLUSION

It is respectfully prayed that the Court should review the judgment of the U.S. Court of Appeals for the Fifth Circuit, and summarily without scheduling any oral hearing, enter a judgement reversing the decision below, ordering a remand of these cases to the Texas court system, or in the alternative ordering the lower Federal court to grant hearings after each defendant has made proper allegations.

Respectfully submitted,

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Attorney for the Plaintiff-Appellant, Donald M. Peterson

SCHEDULE OF EXHIBITS

Designation	Content
Exhibit A-1	Order of Federal district court in Civ. Ac. 3-7268, dismissing action against seven individuals
Exhibit A-2	Order of Federal district court in Civ. Ac. 3-7267, dismissing action against two insurance companies
Exhibit B	Copy of appellate court's reported opinion in the instant case
Exhibit C	Copy of statute: Section 1442
Exhibit D	Final order of appellate court denying petition for rehearing
Exhibit E	Copy of notice of appeal

EXHIBIT A-1

In The

United States District Court

For The Northern District of Texas
Dallas Division

Civil Action No. CA-3-7268-D

Donald M. Peterson, Plaintiff

v.

Bill West, James A. Martin, III, Harold Stafford, Martha A. McSteen, Carl Gruninger, James A. Adams, and Donald Paul Chancellor, Defendants

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by the defendants came on for hearing before the court, Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the motion should be sustained. The issues raised by the plaintiff in the above styled case are the identical issues which were resolved on their merits in Civil Action No. CA-3-5158-D and cannot again be litigated between the same parties and their privies. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931).

It is therefore ORDERED that the Motion for Summary Judgment filed by the defendants is sustained.

Robert M. Hill,
United States District Judge

Dated this 6th day of December, 1973.

EXHIBIT A-2

In The

United States District Court

For The Northern District of Texas
Dallas Division

Civil Action No. CA-3-7267-D

Donald M. Peterson, Plaintiff

v.

Blue Cross/Blue Shield of Texas, Group Medical & Surgical Service and Group Hospital Service, Inc., Defendants

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by the defendants came on for hearing before the court, Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the motion should be sustained. The issues raised by the plaintiff in the above styled case are the identical issues which were resolved on their merits in Civil Action No. CA-3-5158-D and cannot again be litigated between the same parties and their privies. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931).

It is therefore ORDERED that the Motion for Summary Judgment filed by the defendants is sustained.

United States District Judge
Robert M. Hill,

Dated this 6th day of December, 1973.

EXHIBIT B

Donald M. Peterson, Plaintiff-Appellant,
v.
Blue Cross/Blue Shield of Texas et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,
v.
Bill West et al., Defendants-Appellees.

No. 74-1374.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1975.

Physician brought action seeking damages for alleged malicious prosecution and for tortious conduct related to his alleged wrongful suspension under medicare program. The United States District Court for the Northern District of Texas, Robert M. Hill, J., granted defendants' motion for summary judgment, and physician appealed. The Court of Appeals, Dyer, Circuit Judge, held that action for damages alleging wrongful suspension of physician under medicare program brought against vice president of state medical services corporation and various HEW employees was properly removed from state court; that the district court had jurisdiction of the parties and the subject matter; and that all defendants had governmental immunity from suit.

Affirmed.

1. United States 141(8)

Evidence in action brought by physician seeking damages

for alleged malicious prosecution and wrongful suspension under medicare program was sufficient to sustain finding that vice president of state medical services corporation and various HEW employees who were defendants in the action were either officers of the United States or of an agency thereof or persons acting under such officer and that their actions were under color of such office.

2. United States 125(28)

Corporate defendants in action brought by physician seeking damages for alleged wrongful suspension under medicare program which were simply medicare fiscal intermediaries acting pursuant to contract with the government qualified for protection under doctrine of sovereign immunity.

3. Removal of cases 21

Purpose of federal officer removal statute is to prevent federal officers or persons acting under their direction from being tried in state courts for acts done within the scope of their federal employment. 28 U.S.C.A. §§ 1442, 1442(a)(1).

4. Removal of Cases 21

Action brought by physician against vice president of state medical services corporation and various HEW employees for damages for alleged malicious prosecution and wrongful suspension of physician under medicare program was properly removed into federal court under federal officer removal statute. 28 U.S.C.A. § 1442(a)(1).

5. United States 78(13)

Where vice president of state medical services corporation, which was employed as fiscal intermediary for Medicare,

and various HEW employees did not act outside scope of employment in suspending physician under medicare program, such defendants enjoyed full immunity under doctrine of sovereign immunity from subsequent action brought by a physician seeking damages for alleged malicious prosecution and wrongful suspension.

Appeals from the United States District Court for the Northern District of Texas.

Before DYER, SIMPSON and CLARK, Circuit Judges.

DYER, Circuit Judge:

In these two cases (consolidated on appeal) Dr. Peterson sought damages for malicious prosecution and for tortious conduct related to his alleged wrongful suspension under the Medicare program. The district court granted summary judgment for the defendants. We affirm.

The first suit was filed May 8, 1973, in a Texas state court against West, Vice President of Blue Cross of Texas, Stafford and Martin, Regional and Assistant Regional Counsel, respectively, of the Department of Health, Education and Welfare, and McSteen, Gruninger, Adams and Chancellor, all H.E.W. employees, whose duty it was to insure the integrity of the Medicare program. The claims made in this suit are admittedly identical (except for malicious prosecution) with the claims made in Peterson v. Weinberger, 5 Cir. 1975, — F.2d — this day decided. Likewise, the defendants are the same in both suits except for the addition here of the defendants West, Stafford, and Martin.

The second suit filed a week later, on May 17, 1973, in a Texas state court was against Blue Cross/Blue Shield of Texas, Group Medical and Surgical Services, and Group Hospital Service, Inc. It raised the identical issues against the same corporate defendants as were included in *Weinberger, supra.* Admittedly this was a "protective" suit filed in the state court against the contingency that the federal court would determine in *Weinberger* that it was without jurisdiction over the corporate defendants.

Final judgment in *Weinberger* was entered on October 29, 1973. The district court found that Peterson had failed to prove a claim for either breach of contract or tort damages. It further found that the agents and employees of the Government had immunity from liability because they had acted within the scope of their employment in suspending Peterson and withholding payments due him under the Medicare program because of his possible fraud. The court also found that Peterson and his brother had submitted false claims to the Government, for which they were cast in damages.

A petition for removal under 28 U.S.C.A. § 1442(a)(1),[1] was timely filed in both state court cases in behalf of all the defendants as officers, employees, and agents of the United States. The district court granted summary judgment for the Government, finding that the issues prseented were identical

[1] 28 U.S.C.A. § 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the distric court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under hm, for any act under color of such office.

to those resolved on the merits in *Weinberger* and therefore should not be relitigated. We have this day affirmed *Weinberger* in all respects.

Peterson makes a two-pronged attack in these cases. He contends that both cases were improperly removed and should have been remanded, *ergo* the district court was without jurisdiction to pass upon the merits. He next argues that, even if the district court had jurisdiction, the judgment in *Wienberger* does not operate as *res judicata* because in one of these suits, a new cause of action (malicious prosecution) was alleged, and in the other, three additional defendants were included.

Although we are strongly inclined to the view that the issues resolved in *Weinberger* were identical to the issues in these suits and are therefore *res judicata* as to the same defendants *and their privies*, we prefer to sustain the district court's judgment on the grounds that the removal of the suits was proper, the district court had jurisdiction of the parties and the subject matter, and all the defendants had governmental immunity from liability.

The defendants in these suits, except West, Stafford and Martin, were defendants in *Weinberger*. West's official capacity and his duties and responsibilities were detailed by him in that proceeding. Stafford and Martin, Regional and Assistant Regional Counsel, H.E.W., here named as co-conspirators, are alleged to have carried out the same illegal acts leading to Peterson's Medicare suspension as were attributed to the *Weinberger* defendants.

[1, 2] It is indisputable that each of the defendants was either an "officer of the United States or an agency thereof, or persons acting under him" and that their actions were "under color of such office." Peterson urges however, that what he labels as tortious conduct took the defendants beyond the scope of their statutory authority. We took some pains in *Weinberger* to relate the factual background leading to the suspension of Peterson and concluded that "[t]here is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their employment in carrying out their official responsibilities" Peterson v. Weinberger, *supra*, at 3580. We further concluded that since the corporate defendants were simply Medicare fiscal intermediaries, acitng pursuant to a contract with the government, they were under the sovereign immunity umbrella.

[3] The purpose of the removal statute is to prevent federal officers or persons acting under their direction from being tried in state courts for acts done within the scope of their federal employment. In Willingham v. Morgan, 1969, 395 U.S. 402, 405, 89 S.Ct. 1813, 1815, 23 L.Ed.2d 396, the Supreme Court noted that "the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases when federal officials must raise defenses arising from their official duties" On this premise, the Court further noted that "the test for removal should be broader, not narrower, than the test for official immunity." *Id.* In fashioning a broad application of the statute, the Court said:

> The federal officer removal statute is not "narrow" or "limited." Colorado v. Symes, 286 U.S. 510, 517 [52 S.Ct. 635, 637, 76 L.Ed. 1253] (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. . . . This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1). *Id.* 395 U.S. at 406-407, 89 S.Ct. at 1816.

In a variety of circumstances removals under § 1442(a)(1) have been upheld; for example, Chafin v. Pratt, 5 Cir. 1966, 358 F.2d (libel and slander suit against eight employees of the Public Health Service's Communicable Disease Center); Murphy v. Kodz, 9 Cir. 1965, 351 .2d 163 (mid-air plane collision wrongful death suit against an officer of the United States Forest Service); Poss v. Lieberman, 2 Cir. 1962, 299 F.2d 358 (libel suit against a claims representative of H.E.W.); Texas v. National Bank of Commerce of San Antonio, 5 Cir. 1961, 290 F.2d 229 (*quo warranto* suit by Texas against National Bank for violation of Texas law).

[4, 5] We conclude that the defendants in the instant actions were persons acting within the purview of § 1442(a)(1) and that the suits were properly removed. Removability having been established, the district court had jurisdiction to consider the controversy. What we said in *Weinberger* concerning immunity is fully applicable here. The entry of judgments for the defendants was proper.

Affirmed.

EXHIBIT C

U.S.C. Title 28, § 1442

1442. Federal officers sued or prosecuted.—(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a non-resident of such State, wherein juridsiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, c. 646, § 1, 62 Stat. 938.)

EXHIBIT D

In The

United States Court of Appeals

For The Fifth Circuit

No. 74-1374

Donald M. Peterson, Plaintiff-Appellant,

v.

Blue Cross/Blue Shield of Texas, et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,

v.

Bill West, et al., Defendants-Appellees.
Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(March 26, 1975)

Before DYER, SIMPSON and CLARK, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

EXHIBIT E

In The

United States Court of Appeals

For The Fifth Circuit

No. 74-1374

Donald M. Peterson, Plaintiff-Appellant,

v.

Blue Cross/Blue Shield of Texas, et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,

v.

Bill West, et al., Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice given by:
Glynn A. Pugh
5101 Ross Ave., Suite 201
Dallas, Texas 75206
Attorney for Appellant

1. Notice is hereby given that Dr. Donald M. Peterson, the plaintiff above-designated, hereby appeals to the Supreme Court of the United States from the final order entered in this case on March 26, 1975, which denied plaintiff's petition for rehearing.

2. The parties in each of the two proceedings are as follows:

First case: *Peterson v. Blue Cross/Blue Shield of Texas*

Name	*Party*
Donald M. Peterson	Plaintiff

Group Hospital Service, Inc.	Defendant
Group Medical & Surgical Service	Defendant

Second case: *Peterson v. Bill West et al.*

Name	*Party*
Donald M. Peterson	Plaintiff
Bill West	Defendant
James A. Martin, III	Defendant
Harold Stafford	Defendant
Martha A. McSteen	Defendant
Carl Gruninger	Defendant
James A. Adams	Defendant
Donald Paul Chancellor	Defendant

3. The Court of Appeals judgment in this case was to the following effect:

(1) the Federal courts have jurisdiction over every defendant, as each defendant proved his entitlement to the benefits of 28 USC Sec. 1442(a)(1);

(2) every defendant is entitled to official immunity;

(4) therefore, the two cases are dismissed.

4. In a separate letter the Clerk is requested to prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, to include items in the transcript as needed and as agreed to by counsel for the Defendants-Appellees.

5. The following questions are presented by this appeal:

(1) Though without legislatvie powers, the lower courts

here legislated by amending 28 USC Sec. 1442(a)(1), by eliminating therefrom a material part of the sentence and thereby accepting jurisdiction of a case not properly transferrable under Section 1442(a)(1) from the State to the Federal court system.

(2) The appellate court (Court of Appeals) erred in making assumptions of fact which were unproven, which facts were the predicate upon which Federal court jurisdiction was based.

(3) The appellate court's decision is contrary to *Scheuer v. Rhodes* (April, 1974) 40 L.Ed. 2d 90 in that absolute and blanket immunity was granted to nine different defendants without any hearings or evidence whatsoever as to their immunity. Granting of such personal defenses, not raised by defendants in the lower court, was error. They were presented as a crosspoints in defendant's brief to the appellate court.

This notice given by

Glynn A. Pugh, Attorney for the Plaintiff-Appellant, Dr. Donald M. Peterson

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1360

DONALD M. PETERSON, PETITIONER

v.

BLUE CROSS/BLUE SHIELD OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-7)[1] is reported at 508 F.2d 55.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1975. A timely petition for rehearing was denied on March 26, 1975 (Supp. App. A-12). The petition for a writ of certiorari was filed on April 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner has filed two documents with the Court in this case, a petition for a writ of certiorari and an "Appendix to Petition." "Pet. App." refers to the appendix contained in the former document, "Supp. App." to the latter document.

QUESTIONS PRESENTED

1. Whether the district court properly removed these cases from the state court, pursuant to 28 U.S.C. 1442 (a)(1).

2. Whether these suits are barred by the doctrine of governmental immunity.

3. Whether the decision of the court of appeals in these cases is inconsistent with its decisions in other companion cases.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant portions of the Fifth Amendment to the Constitution and of the removal statute, 42 U.S.C. 1442 (a)(1), are set forth at Pet. 4-5.

STATEMENT

This is one of two companion cases (see *Petersen v. Weinberger*, No. 74-1442, petition for a writ of certiorari filed May 16, 1975), both of which rest upon essentially the same factual basis.

In July 1969, the Department of Health, Education, and Welfare ("HEW") received a complaint questioning Medicare Act payments to petitioner for services not rendered by him (Pet. App. A-23). Its investigation revealed that during the first six months of 1968, Concord Manor Nursing Home, an extended care facility owned by James E. Peterson, petitioner's brother, submitted bill for physical therapy services rendered to patients in its care by a physical therapist employed by Zodiac, Inc., another corporation owned by James E. Peterson (Pet. App. A-10 to A-11).

At the time these services were rendered, payment for physical therapy services could not be made to Zodiac but could be made only to Concord as a "provider of services" (see 42 U.S.C. 1395x(u)) within the meaning of Part A of

the Medicare Act, 42 U.S.C. 1395c, *et seq.*[2] Such payments are limited to the "reasonable cost" of such services. 42 U.S.C. 1395f(b). The bills were submitted by Concord to the organizations that served as "fiscal intermediaries"[3] for HEW[4] (Pet. App. A-10).

Prior to the payment of these bills, Concord was suspended from the Medicare Part A program for failure to file required cost reports with HEW (Pet. App. A-21). In order to obtain payment despite the suspension of Concord, James Peterson determined to submit bills for the same services to HEW pursuant to Medicare Part B, 42 U.S.C. 1395j to 1395w (*ibid.*).[5] Under this portion of the program, payment could be made only if the services were provided by a physician or under his personal direction (Pet. App. A-21 to A-22). Accordingly, James Peterson directed his employees to affix petitioner's signature to the certification, contained on Part B forms, that the services had been rendered by petitioner or under his personal supervision (*ibid.*).

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[2]Part A of the program is designed to provide "basic protection against the costs of hospital and related post-hospital services * * * for individuals who are age 65 or over * * *." 42 U.S.C. 1395c.

[3]Blue Cross/Blue Shield of Texas, Travelers Insurance Company, and Group Medical & Surgical Services are the fiscal intermediaries or "carriers" involved in this case (Pet. App. A-3).

[4]Pursuant to 42 U.S.C. 1395h, a provider of services may nominate a private organization, here Mutual of Omaha, to act as a "fiscal intermediary." If the intermediary then enters into an agreement with the Secretary, the provider submits its bills to the intermediary, who is responsible for their payment as agent for the Secretary. 42 U.S.C. 1395h(a).

[5]Medicare Part B is a voluntary health insurance program financed in part by premiums paid by beneficiaries and in part by the federal government. 42 U.S.C. 1395j. The program is designed to assist beneficiaries in the payment of health care provided by physicians.

These forms were submitted to the organizations that act as "carriers" for the Secretary under Part B of Medicare.[6] Payment was made to petitioner by check on the basis of the "reasonable charge" (42 U.S.C. 1395*l*(a)(1)) for the services.[7] Petitioner deposited the checks in his personal account and sent a personal check to James Peterson, who deposited it in the Zodiac account (Pet. App. A-22). Subsequently, petitioner received, but did not pay, six invoices from Zodiac for therapy services rendered during the first six months of 1968 at Concord (Pet. App. A-23).

As a result of the investigation and because of the possibility of fraud, in December 1969 the Secretary issued a letter to the carriers under Part B ordering suspension of further payments to petitioner under the Medicare program (Pet. App. A-24).[8]

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[6]Pursuant to the Act, the Secretary may enter into agreements with private organizations to serve as "carriers" under Part B. 42 U.S.C. 1395u. The carriers perform certain specified functions, including the making of determinations of the rate of payment and the making of payments.

[7]Unlike Medicare Part A, where payment is made upon the basis of "reasonable cost" (42 U.S.C. 1395f(b)), payment under Part B is made upon the basis of the "reasonable charge" for the service (42 U.S.C. 1395*l*(a)(1)).

[8]This notice had the additional effect of suspending payments to petitioner by Group Hospital Services, Inc., an organization that administers payments under the Texas Medicaid program. Established under Title XIX of the Social Security Act, 42 U.S.C. 1396, *et seq.*, Medicaid is a joint federal-state program providing for federal grants to the states for the purpose of providing medical assistance to families with dependent children and aged, blind, or permanently disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. 1396a.

In September 1971, petitioner instituted suit in the United States District Court for the Northern District of Texas, against the United States, the Secretary, the Attorney General, and most of the named respondents here, seeking injunctive relief and damages for alleged breach of contract and tortious conduct in connection with his suspension from the Medicare program (Pet. App. A-3).[9] The government counterclaimed against petitioner and filed a third-party complaint against James Peterson, seeking damages under the False Claims Act, 31 U.S.C. 231. The district court denied petitioner relief and awarded damages to the government on its counterclaim and third-party complaint.

The court of appeals affirmed. It held that petitioner had failed to prove a claim for either breach of contract or tort, that the defendants were officially immune from liability, and that the petitioner and James Peterson had submitted false claims to the United States (Pet. App. A-19 to A-39; *Peterson* v. *Weinberger*, 508 F.2d 45, pending on petition for a writ of certiorari, No. 74-1442).

Thereafter, in February 1973, petitioner and James Peterson were indicted for making false statements to the United States, in violation of 18 U.S.C. 1001, and conspiracy to do so, in violation of 18 U.S.C. 371. After a jury trial, James Peterson was found guilty on all counts. Petitioner was convicted only on the conspiracy count (Pet. App. A-9). The court of appeals affirmed the conviction of James Peterson for violation of 18 U.S.C. 1001, but reversed both conspiracy convictions (Pet. App. A-8 to A-17; 488 F.2d 645).

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[9]The district court ordered the defendants to pay petitioner the funds due him conditioned upon his payment of a bond (Pet. App. A-27).

In May 1973, petitioner filed, in a Texas state court, the two complaints involved in this case. Except for the addition of a count alleging malicious prosecution and the addition, as defendants, of the Vice-President of Blue Cross of Texas and two HEW attorneys, the claims in the first suit were identical to those litigated in petitioner's 1971 federal suit (Pet. App. A-3).[10] The claims in the second complaint were essentially identical to those made against the corporate respondents by petitioner in 1971; it was a "protective" suit, filed in case the federal district court found that it lacked jurisdiction over those corporate defendants (*ibid.*).

Petitions for removal were filed by the defendants and granted by the district court (*id.* at A-4). The district court determined that the issues presented were identical to those litigated in petitioner's earlier suit and held that petitioner's new lawsuits were barred by *res judicata* (*ibid.*). On consolidated appeals, the court of appeals affirmed (Pet. App. A-2 to A-7). The court did not address the question of *res judicata*, but held that the defendants possessed governmental immunity from liability (Pet. App. A-5 to A-7).

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[10]The HEW officials common to the suits were the regional representative responsible for administering the Medicare program in Texas and four other states, the person responsible for supervising all fraud and abuse cases, a program integrity specialist responsible for investigating claims of fraud or abuse and recommending whether to prosecute, and another program integrity staff worker; the additional parties in this case are the regional counsel and assistant regional counsel (Pet. App. A-3, A-28).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the removal statute, 28 U.S.C. 1442(a)(1),[11] only authorizes removal when an officer of the United States or person acting under him is sued for an act under color of such office committed "*either* in apprehension or punishment of criminals *or* in collection of revenues" (Pet. 9; emphasis in original). Petitioner's narrow reading of the removal statute, however, is contrary to the settled decisions of this Court and of the courts of appeals, which have upheld the action of district courts in granting removal, in cases other than criminal prosecutions or tax proceedings, where the defendants, as here, were sued for acting under color of office. See, *e.g.*, *Willingham* v. *Morgan*, 395 U.S. 402; *Murphy* v. *Kodz*, 351 F.2d 163, 165 (C.A. 9); *Poss* v. *Lieberman*, 299 F.2d 358, 359 (C.A. 2), certiorari denied, 370 U.S. 944.[12]

2. Petitioner argues (Pet. 12-13) that the court of appeals erred in holding all respondents immune from liability. In the 1971 suit, after a trial extending five days,

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[11]Section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

[12]Petitioner contends that one of the corporate respondents, Group Hospital Services, Inc., was acting pursuant to a contract with the State of Texas and was thus not entitled to removal (Pet. 10). Even if that respondent were not entitled to removal if named as the sole defendant, that would not bar removal when a federal officer or agent entitled to removal is also named as a defendant, for it is the entire suit that is removed to the federal court. *E.g.*, *Allman* v. *Hanley*, 302 F.2d 559, 562 (C.A. 5); *Bradford* v. *Harding*, 284 F.2d 307, 309-310 (C.A. 2).

the district court held that the action was barred by the doctrine of governmental immunity (Pet. App. A-28 to A-31). The court of appeals agreed, noting that "[t]here is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their employment in carrying out their official responsibilities" (Pet. App. A-29).[13] In the instant case, the court of appeals held that its conclusion concerning governmental immunity in the 1971 case was "fully applicable here" (Pet. App. A-7). As we discuss further in our opposition in No. 74-1442 (see p. 5, *supra*), that determination was correct and does not warrant further review. See *Barr* v. *Matteo*, 360 U.S. 564; cf. *Scheuer* v. *Rhodes*, 416 U.S. 232; *Wood* v. *Strickland*, No. 73-1285, decided February 25, 1975, slip op. 13-14.[14]

3. Petitioner's assertions (Pet. 13-15) that the court of appeals' affirmance here was inconsistent with its earlier reversal of his conviction for conspiracy, and that the court improperly relied upon its decision in his related 1971 action, are insubstantial.[15] Petitioner's acquittal does not establish the tortious conduct that he alleges in his complaint.

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[13]Petitioner appears to contend (Pet. 12) that the doctrine of governmental immunity is not applicable here because "the defendants are field investigators and their co-conspirators." The court of appeals correctly rejected this contention (Pet. App. A-29 to A-30).

[14]In any event, the correctness of the court of appeals' ruling on immunity need not be considered in this case because the judgment could be sustained on the ground of *res judicata* on which the district court relied. Petitioner is not entitled to relitigate the same issues merely by joining as defendants additional employees of the Secretary or his agents who carried out the acts that underlay petitioner's contentions in the 1971 suit (Pet. App. A-5). See *Baldwin* v. *Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 525.

[15]We address petitioner's related contention, that the court of appeals' decision in his 1971 suit also was inconsistent with his acquittal of conspiracy, in our opposition to his petition in No. 74-1442.

Moreover, the court of appeals correctly relied here upon its holding, in the 1971 action, that the respondents possessed official immunity from suit. Petitioner has not shown any differences in the factual bases for that suit and the present suits that would justify a different ruling here on the question of immunity nor any reason why the rationale of the court's opinion in his 1971 suit does not properly extend to the additional parties added as defendants here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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REX E. LEE,
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JUNE 1975.

DOJ-1975-06